UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADT LLC D/B/A ADT SECURITY SERVICES	)	
and	)	Cases 03-CA-184936 03-CA-192545
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 43.	)	

RESPONDENT ADT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent ADT, LLC d/b/a ADT Security Services, Inc. (the "Respondent" or "ADT") respectfully files the following exceptions and supporting brief to the Decision of Administrative Law Judge ("ALJ"), Michael A. Rosas, dated August 4, 2017.[1] ALJ Rosas's decision is based on a fundamental legal error. The ALJ inexplicably ignored decades of Board precedent related to alleged 8(a)(5) violations where there is a sound arguable basis under the applicable collective bargaining agreement for the Respondent's actions and instead based his decision upon the unilateral change doctrine under *NLRB v. Katz*, 369 U.S. 736, 743 (1962). This fundamental legal error led the ALJ to impermissibly conclude that Respondent violated Sections 8(a)(5) and (1) of the Act by unilaterally and without the consent of the Union implementing a six-day workweek for service technicians in the Albany unit and a bi-weekly six-day workweek for the service technicians in the Syracuse unit. The ALJ erred in concluding the Respondent refused to bargain with the Union when it implemented the aforementioned six-day workweek in Albany and Syracuse without first giving the Union notice and an opportunity to bargain.

The ALJ further erred in finding that the Respondent engaged in direct dealing with employees regarding mandatory terms and conditions of employment. The ALJ based this finding upon the Company's decision to grant a unit employee member an exception to the six-day workweek. The ALJ ignored record evidence that showed the employee in question first spoke with his union steward who made no attempt to discuss the employee's specific issues

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[1]References to the ALJ's Decision are designated as (ALJD _____). References to the transcript of proceedings are designated as (Tr. ____). References to the General Counsel Exhibits are designated as (GC Ex. ____). References to Union Exhibits are designated as (U. Ex. _____). References to Joint Exhibits are designated as (Jt. Ex. ____).

with management. The ALJ ignored the fact the employee in question approached the employer about his situation, only after failing to receive any assistance from his union representative. He proffered a legitimate reason for his inability to work the scheduled hours. The Union's position is that this constituted direct dealing, but forcing the employee to work the schedule would have led to his termination, which the Union would have grieved, because he explicitly told the Respondent, in advance, that he would not work the Saturday hours for fear of losing custody of his child.

The ALJ also erred in finding that the Respondent's delay in providing relevant information was unlawful because it was prejudicial and hampered the Union's ability to enforce the contract.

As outlined in detail below, the ALJ's decision is based neither on the applicable Board precedent nor on the facts in the record. The ALJ's findings that the Respondent violated the Act by implementing a six-day workweek at its Albany and Syracuse locations, engaging in direct dealing and delaying information to the Union are unsupported by the record, contrary to law, and should be reversed.

STATEMENT OF THE CASE

The initial charge filed by the International Brotherhood of Electrical Workers, Local 43 (the "Union") in Case 03-CA-184936, dated September 26, 2016, alleges the Respondent abnegated the provisions of its labor agreement regarding the duration of the workweek by implementing a six-day workweek in violation of Sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act (the "Act") 29 U.S.C. § 151 *et seq.* (GC Ex. 1(a); GC Ex. 1(p), ¶ I(a)). A first, second and third amended charge in Case 03-CA-184936 were subsequently filed by the Union. (GC Ex. 1(c), 1(e), 1(g)). The third amended charge alleges the Respondent

violated the Act by abnegating the provisions of its labor agreement regarding the duration of the workweek by implementing a six-day workweek, unilaterally changing terms and conditions of employment regarding the duration of the workweek by unilaterally implementing a six-day workweek and by not providing information requested by the Union. (GC Ex. 1(g)).

The Union filed a charge in Case 03-CA-192545, dated February 7, 2017, alleging the Respondent communicated directly with bargaining unit members in violation of Sections 8(a)(1) and 8(a)(5) of the Act. (GC Ex. 1(i)). In an order dated April 21, 2017, Region 3 consolidated Case 03-CA-184936 with Case 03-CA-192545. (GC Ex. 1(n)). A hearing was held on June 13, 2017 before Administrative Law Judge Michael A. Rosas. (Tr. 1). The ALJ issued a decision finding the Respondent violated Section 8(a)(5) and (1) of the Act implementing a six-day workweek at its Albany and Syracuse locations, engaging in direct dealing and delaying information to the Union. (ALJD 8–11).

QUESTIONS INVOLVED

1. Did the ALJ err in finding that the Respondent's implementation of a six-day workweek at its Albany and Syracuse locations was a violation of Section 8(a)(5) and (1) of the Act? (Exceptions I, II).
2. Did the ALJ err in finding that the Respondent engaged in direct dealing with employees regarding mandatory terms and conditions of employment? (Exceptions III, IV).
3. Did the ALJ err in finding that the Respondent delayed in providing information to the Union necessary and relevant to its role as the employee's bargaining representative? (Exceptions V, VI).

STATEMENT OF THE FACTS

I. The Parties

ADT is a national corporation providing electronic security systems and services including the installation and service of residential and commercial security systems with operations in Albany and Syracuse, New York. (ALJD 2; GC Ex. 1(p), ¶ II(a)). The Union is the collective bargaining representative for all full-time and regular part-time "residential and small business installers, residential and small business high volume commissioned installers, residential and small business service technicians" employed by ADT at its Albany and Syracuse locations. (ALJD 2–3; Jt. Ex. 2, p.3; Jt. Ex. 3, p.3).

II. The Six-Day Workweek

In 2016, Apollo Group Management acquired ADT and thereafter merged ADT with Protection 1, another security service company. (ALJD 2, 5; Tr. 111; Jt. Ex. 7). With an aim at improving ADT's customer retention rates, ADT considered adopting a six-day workweek pursuant to Protection 1's "In Standard," which targets responses to at least 75% of customer service calls within 24 hours. (Tr. 112, 117; Jt. Exs. 1, 7). ADT's Director of Labor Relations, James Nixdorf, reviewed all relevant labor agreements to determine whether there were any restrictions in the Respondent's implementation of a six-day workweek. (Tr. 117). After determining there was no language in the labor agreements prohibiting ADT from assigning overtime work on a Saturday/the sixth day, ADT moved forward with the implementation of a six-day work schedule. (Tr. 109–130, 117).

Accordingly, on September 6, 2016, the Area General Manager, Michael Kirk, sent an e-mail to a group of ADT managers informing them of the new customer service targets on all new installation and service tickets. (ALJD 5–6; Jt. Ex. 1). The September 6 e-mail further explained that to reach these targets, ADT would implement a mandatory six-day workweek in

markets with large backlogs. (ALJD 5–6; Jt. Ex. 1). In certain markets, including Albany, New York, the six-day workweek began on September 22, 2016 and continued on a weekly basis until the new targets were met. (Tr. 34; Jt. Ex. 1). In other markets, including Syracuse, New York, the six-day workweek began on September 22, 2016 and continued on a bi-weekly basis until the new target rates were met. (Jt. Ex. 1). Whether a location operated on this schedule every week or every other week was contingent on the backlog at the specific location, which, in turn, was based on the number of outstanding tickets at each location. (Jt. Ex. 7). ADT listed one exception to the mandatory six-day workweek for technicians who were attending classes and enrolled in higher education pursuant to the Respondent's tuition reimbursement program. (Jt. Ex. 1, Tr. 121).

The Respondent emailed all technicians in Albany and Syracuse regarding ADT's new target rates and related changes to the workweek. (ALJD 6; Jt. Ex. 1). Immediately after, on September 7, 2016, through an e-mail from ADT's Regional HR Manager, Michael Stewart, to Pat Costello ("Costello") and Al Marzullo ("Marzullo") of the Union, the Respondent informed the Union of the same. (ALJD 6; Tr. 23; Jt. Ex. 4). Throughout this time period, the Respondent communicated with the Union concerning the status of the project. For example, in an e-mail on October 13, 2016, ADT updated the Union on the status of the backlog at the Albany and Syracuse locations. (Jt. Ex. 7). ADT informed the Union that as of October 11, 2016 the Albany location had a backlog of 93 tickets and would continue to work a six-day workweek until the backlog was reduced by 69 tickets. (Jt. Ex. 7). At the same time, ADT reported that the Syracuse location had achieved its target numbers and would return to the five-day workweek on or about October 22, 2016. (Jt. Ex. 7). The Albany location resumed a five-day workweek after about three months. (ALJD 6; Tr. 36–38). The Syracuse location resumed a five-day workweek

after about one month. (ALJD 6; Jt. Ex. 7). There is no evidence on record that the temporary six-day workweek was implemented for any other reason than the legitimate business reasons expressed to the Union. (Tr. 39–40). There is no evidence of animus, bad faith, or intent to undermine the Union. (Tr. 39–40).

III. The Union's September 19 Information Request

In a letter dated September 19, 2016, the Union sent the Company the following nine-item request for information:

1. Please provide copies of any survey, study, investigation or summary related to customer service targets for installation and service tickets referenced in ADT's September 7, 2016 correspondence to bargaining unit members, together with any internal or external communications related thereto.
2. Please provide copies of all internal and external communications concerning studies, projections, recommendations, or other correspondence by Company personnel or outside personnel related to the need to change to a six-day workweek and/or recommendations on how to implement it operationally.
3. Please provide copies of all internal and external communications concerning application of the collective bargaining agreements between Local 43 and ADT to ADT's plan to implement a six-day workweek.
4. Please provide copies of all internal and external communications concerning application of a collective bargaining agreement between any labor organization and ADT to ADT's plan to implement a six-day workweek. This is relevant as it relates to ADT's knowledge concerning the bargaining process.
5. Please provide copies of all studies, investigations, or summaries and internal and external communications concerning the decision to implement six day workweeks twice a month for some locations and every week for other locations, and the factors ADT considered in setting those frequencies. Specifically, the Union seeks this information to address ADT's reasoning and accuracy of the facts, figures, and theories relied on, which may impact the Union's bargaining position.
6. Please provide copies of all internal and external communications concerning studies, projections, recommendations, or other correspondence by Company personnel or outside personnel relating to the decision to exclude only "those technicians that are currently attending classes and are enrolled in higher education" from having to work the

extended workweek. This is relevant because it will impact any effects bargaining, if necessary.

7. Please provide copies of all internal and external communications concerning studies, projections, recommendations, or other correspondence in calculating how and whether each market will achieve the desired customer service target.

8. Please provide all internal and external communications concerning studies, projections, recommendations, or other correspondence detailing how the manager will post locally the desired target at each location, including the frequency of the posting, location of the posting, and general operation of the posting.

9. Please provide copies of all documents, correspondence, and internal and external communications relied on to support ADT's ability to establish a six-day workweek under any collective bargaining agreements between Local 43 and ADT or ADT and another labor organization.

(ALJD 6–7; Jt. Ex. 6).

Shortly after, in an e-mail dated October 6, 2016, the Company informed the Union that it was in the process of preparing a response to its September 19 information request and would provide a response by October 14, 2016. (ALJD 7; Jt. Ex. 6). As promised, on October 13, 2016, ADT responded to the Union's September 19 information request by articulating its objections to the Union's information request. (ALJD 7; Jt. Ex. 7). ADT objected on the grounds that several of the items were vague and ambiguous. (ALJD 7; Jt. Ex. 7). ADT further objected on the grounds that several items did not appear to be relevant, particularly where they requested communications with unions and/or locations other than those within the Union's jurisdiction. (ALJD 7; Jt. Ex. 7).

Without waiving these objections, ADT provided information regarding its need for a six-day workweek and the reasons for which it decided to implement a bi-weekly six-day workweek at some locations and a continuous six-day workweek at other locations. (ALJD 7; Jt. Ex. 7). ADT stated that following ADT's integration with Protection 1, in order to meet customer service targets on all new installations and service tickets, it needed to reduce the

backlog of tickets nationwide. (ALJD 7; Jt. Ex. 7). ADT further explained the differences in backlogs between the Albany facility and the Syracuse facility, noting that "[d]epending on the severity of the backlog, ADT determined which locations needed to temporarily implement 6 day work weeks every week, and which needed to temporarily implement 6 day work weeks bi-weekly." (Jt. Ex. 7). This information was responsive to item no. 2 of the Union's information request. ADT also attached spreadsheets which included data on the backlog and target numbers for each location. (Jt. Ex. 7). This information was responsive to item nos. 1 and 5 of the Union's information request.

On October 24, 2016, the Union replied to Respondent's October 13 e-mail with two letters together listing each item of its September 19 information request and demanding a response thereto. (Jt. Ex. 8, 9). Soon after, on October 31, 2016, the Respondent replied that it was in the process of reviewing the issues raised by the Union with its legal counsel and would be updating the Union with a response soon. (Jt. Ex. 10). On December 16, 2016, the Respondent supplemented its responses to the Union's information request and confirmed it had no further responsive information. (Jt. Ex. 15).

IV. Sopok's Request for a Personal Accommodation

On or about September 20, 2016, service technician, Michael Sopok ("Sopok"),[2] approached the Respondent urging the Respondent to accommodate his request for an exemption from the six-day workweek. (Tr. 46, 75; GC Ex. 16). In his letter to the Respondent, Sopok stressed that the six-day workweek would subject him to a custody battle with his ex-wife and that he could simply not sacrifice losing custody of his eleven year-old daughter. (GC Ex. 16). Sopok followed his letter to the Respondent with a letter from his ex-wife threatening to take him

[2] Sopok later voluntarily resigned his employment from ADT based upon the fact that overtime requests interfered with custody rights related to his daughter. (Tr. 78–79).

to court if he forfeited his Saturday's with their daughter. (Tr. 75; GC Ex. 17). By phone, Service and Installation Manager, Peter Bernard, granted Sopok's request. (ALJD 8; Tr. 77–78). At no point did ADT engage in direct solicitation or threat of reprisal nor did it at any point offer or promise a benefit to Sopok. (Tr. 83).

V. The Labor Agreements

Article 1, Section 2, of the Albany and Syracuse labor agreements state, in pertinent part:

> The operation of the Employer's business and the direction of the working force including, but not limited to, the making and the enforcement of reasonable rules and regulations relating to the operation of the Employer's business, the establishment or [sic] reporting time, the right to hire, transfer, lay off, promote, demote, and discharge for cause, assign or discipline employees, to relieve employees from duties because of lack of work or other legitimate reasons, to plan, direct and control operations, to determine the reasonable amount and quality of work needed, to introduce new or improved methods, to change existing business practices and to transfer employees from one location or classification to another is vested exclusively in the Employer, subject, however to the provisions of this agreement.

(Jt. Ex. 3, p. 3–4; Jt. Ex. 2, p. 3).

Article 6, Section 1, of the Albany labor agreement states, in pertinent part:

> The normal work schedule for the Service Department shall be a shift of eight and one-half hours with a thirty- minute lunch period comprising of five consecutive days, Monday through Saturday between the hours of 8:00 a.m. and 12:00 midnight. There will also be a four-day workweek comprised of ten and one half hour shifts, with a thirty-minute lunch period, between the hours of 8:00 a.m. and 12 midnight, Monday through Friday. Customer needs may periodically make it necessary for work to be performed beginning at 7:00 a.m. The Company will first seek qualified volunteers to perform such work, if there are no qualified volunteers then the least senior qualified person will be assigned to perform the work.... Advance notice of schedule changes will be given whenever possible, except in cases of emergency, such schedules shall he established one week in advance.
>
> The Installation Department may he scheduled for any eight-hour period between 7:00 a.m. and 5:30 p.m. in any given day between Monday and Friday. Customer needs may periodically make it necessary to add an additional shift for residential installers from Tuesday through Saturday. The Company will first seek qualified volunteers to perform such work. If there are no qualified volunteers then the least senior qualified person will be assigned to perform the work.

(ALJD 4–5; Jt. Ex. 3, p. 10).

Article 6, Section 1 of the Syracuse labor agreement states, in pertinent part:

> The normal work schedule for the service Department shall be a shift of eight and one-half hours with a thirty minute lunch period comprising of five consecutive days, Monday through Saturday between the hours of 8:00 a.m. and 12:00 midnight. There will also be a four-day workweek comprised of ten and one half hour shifts, with a thirty-minute lunch period, between the hours of 8:00 a.m. and 12 midnight, Monday through Friday. Customer needs may periodically make it necessary for work to be performed beginning at 7:00 a.m. The Company will first seek qualified volunteers to perform such work. If there are no qualified volunteers then the least senior qualified person will be assigned to perform the work.... Advance notice of schedule changes will be given whenever possible, except in cases of emergency, such schedules shall be established one week in advance.
>
> The Installation Department may be scheduled for any eight-hour period between 7:00 a.m. and 5:30 p.m. in any given day between Monday and Friday. Customer needs may periodically make it necessary for work, to be performed on a second shift and/or Saturdays. The Company will first seek qualified volunteers to perform such work. If there are no qualified volunteers then the least senior qualified person will be assigned to perform the work.

Article 6, Section 3, of the Albany and Syracuse labor agreements state, in pertinent part:

> All time worked daily in excess of eight (8) hours in a scheduled 5 x 8 hour workweek, in excess of ten (10) hours in a 4 x 10 hour workweek, or weekly in excess of forty (40) hours, or on scheduled days off shall be compensated for at one-half (1 ½) times the employee's regular straight time hourly rate.

(ALJD 4–5; Jt. Ex. 3, p. 10; Jt. Ex. 2, p. 7).

ANALYSIS

The ALJ found that the Respondent violated the Act by implementing a six-day workweek at its Albany and Syracuse locations, engaged in direct dealing and impermissibly delayed providing requested information to the detriment of the Union. These findings are unsupported by the record, contrary to law, and should be reversed. ALJ Rosas's decision ignores key factual information and is based upon the use of the incorrect legal standard. Respondent's implementation of a six-day workweek for a temporary period of time —one

month at the Respondent's Syracuse location and about 3 months at the Respondent's Albany location— was done pursuant to its reasonable interpretation of the labor agreements governing the Albany and Syracuse locations which is consistent with the sound arguable basis standard under current Board law. Instead, ALJ Rosas ignored any analysis of the applicable labor agreements at issue in his decision and relied instead upon legal precedent related to the unilateral change of terms and conditions of employment in situations where the Company and the Union had not yet negotiated collective bargaining agreements.

ADT did not engage in impermissible direct dealing and ALJ Rosas ignored concrete record evidence to find a violation of the Act. While ADT did accommodate one bargaining unit member's request to be excluded from working on the sixth day, the Respondent did so solely at the employee's urging. There was no direct solicitation, threat of reprisal or any offer or promise of a benefit to that employee or any other bargaining unit member of the Albany or Syracuse location.

Finally, ADT was responsive to the Union from the moment it informed the Union of the six-day workweek. And when it received the Union's September 19 information demand, it promptly informed the Union that it was processing its request for information and responded with a thorough explanation of the basis for the need to expand the workweek and provided all responsive documentation in its possession. There is no evidence on record that the Union was in any way prejudiced by any alleged delay.

For these reasons, as more thoroughly explained below, the ALJ's findings are contrary to the record and the law, and should be dismissed.

I. The ALJ's Finding that the Respondent Unilaterally Implemented a Six-Day Workweek in the Albany and Syracuse Units is Without Support in Law or Fact

ALJ Rosas's decision is based on a fundamental misinterpretation of both the relevant facts and law in this matter. This case is based wholly upon the Respondent's right to run its business and mandate overtime for individuals within the contractual limitations spelled out in the parties' labor agreements.

The ALJ erred in concluding the Respondent violated Sections 8(a)(5) and (1) of the Act when it implemented a six-day workweek for service technicians in the Albany unit and a bi-weekly six-day workweek for the service technicians in the Syracuse unit. The ALJ further erred in concluding the Respondent refused to bargain with the Union when it implemented the aforementioned six-day workweek without first giving the Union notice and an opportunity to bargain. In reaching these conclusions, the ALJ ignored a fundamental tenet of federal labor law. Sections 8(a)(5) and (1) of the Act are not implicated where the employer acted on "its reasonable interpretation of the parties' contract." *See NCR Corp.*, 271 NLRB 1212, 1213 (1984); *see also Westinghouse Elec. Corp.*, 313 NLRB 452 (1993) (dismissing an 8(a)(5) allegation "[w]here . . . the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or intent to undermine the union") (quoting *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988)). The Board has long taken the position that it will not enter into a dispute "to serve the function of [an] arbitrator" when the employer's "plausible interpretation" of a collective bargaining agreement differs from the charging party. *NCR Corp.*, 271 NLRB at 1213. Indeed, the Board has found that:

> Where ... an employer has a *sound arguable basis* for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, and there is "no showing that the employer in interpreting the contract as he did, was motivated by union animus or was acting

> in bad faith," the Board ordinarily will not exercise its jurisdiction to resolve a dispute between the parties as to whether the employer's interpretation was correct

Vickers, Inc., 153 NLRB 561, 570 (1965) (emphasis added).

In conducting this analysis, an employer need not be correct. For example, in *Atwood & Morrill Co.*, the ALJ found a violation of the Act where the employer "had at least a colorable contract defense," but "found a violation 'resting simply upon the more appropriate interpretation' of the contract." 289 NLRB 794, 795 (1988). The Board dismissed the allegation and explained that it "will not seek to determine which of two equally plausible contract interpretations is correct." *Id.* Likewise, in *Phelps Dodge Magnet Wire Corporation*, the Board dismissed a complaint regarding an alleged violation of Section 8(a)(5) because "even though the Respondent's construction of article 16.5 may have been erroneous, its interpretation had a sound arguable basis." 346 NLRB 949, 952 (2006). The Board explained that in such circumstances the General Counsel fails to prove a violation. *Id.*

A. The ALJ Erred in Failing to Apply the Sound Arguable Basis Standard

While the Respondent does not dispute that pursuant to *Katz* and its progeny an employer cannot make unilateral changes to terms and conditions of employment without first providing the union notice and an opportunity to bargain, Board law dictates that where the dispute is one of contract interpretation the Board will not find the respondent in violation of the Act where the respondent acted according to its sound arguable basis in the contract. Compare *NLRB v. Katz*, 369 U.S. 736, 743 (1962) and *e.g. Phelps Dodge Magnet Wire Corporation*, 346 NLRB 949, 952 (2006). The ALJ completely disregarded Board precedent wherein the Board has refused to find a violation of Section 8(a)(5) and (1) on the grounds that the employer's midterm change had a sound arguable basis in the contract. (ALJ 8–9). Not only did the ALJ disregard the relevant

Board precedent, he failed to examine the issues related to the parties' interpretation of the contract at all.

B. Articles 1 and 6 of the labor agreements permit ADT to change work schedules and require overtime on Saturdays

The record establishes that ADT has a sound arguable basis for its position based on the contract language and evidence submitted at the hearing. The ALJ completely ignored the record evidence that ADT's decision to temporarily extend work schedules to include work on Saturdays within facilities with large backlogs was done in accordance with its reasonable interpretation of what was permissible under the applicable labor agreements. (Tr. 112). As in *NCR Corp.*, the Union's disagreement with ADT's reasonable interpretation of the labor agreements does not give rise to an unfair labor practice under Section 8(a)(5) or (1). *NCR Corp.*, 271 NLRB at 1213; *see also Atwood & Morrill Co.*, 289 NLRB 794, 795 (declining to determine "which of two equally plausible contract interpretations is correct"); *Monmouth Care Center*, 354 NLRB 11, 87 (2009) (adopting ALJ's determination that "as long as Respondents have a 'sound arguable basis' for its interpretation of the contract, no violation will be found").

Pursuant to the Management Rights Provision (Article 1) of the Albany and Syracuse labor agreements, and subject to other provisions of the agreements, ADT is vested with the authority, among other things, to assign and direct work, control operations, determine reasonable amount and quality of work needed, and change existing business practices. (Jt. Ex. 2, 3). The ALJ failed to even cite Article 1 of the labor agreements in his decision, much less explain his rationale for ignoring it. Article 6, moreover, permits ADT to modify employee work schedules (as long as ADT provides advance notice of the change) and allows ADT to assign work at premium pay on scheduled days off, thus allowing the assignment of a sixth day of work. (Jt. Ex. 2, 3). In fact, the language in both labor agreements expressly contemplates

work on Saturdays. (Tr. 112). Although there is language in Article 6 stating the Respondent will seek volunteers to perform overtime work, it also permits the Respondent to assign bargaining unit members according to seniority with no limitation on how many employees can be assigned at one given time. (Jt. Ex. 3, p. 10; Jt. Ex. 2, p. 7; Tr. 61, 65, 105, 121–22). That is, all employees can be assigned to overtime work on Saturdays. And, in fact, this is what ADT did. While the ALJ is hung up on the concept of the expanded workweek, what this really constitutes is a need for all bargaining unit employees to perform weekly overtime. The contract explicitly permits ADT to require that all available employees report to work on their day off, if business needs dictate.

The Union's own hearing testimony furthers ADT's interpretation of the labor agreements. At the hearing, the Union's Assistant Business Manager and President, Patrick Costello, testified that Article 6 of the labor agreements permits ADT to assign work on a scheduled day off, the sixth day. (Tr. 34–38). He acknowledged that the labor agreements place no limit on the number of employees the Respondent can assign to overtime work. (Tr. 61, 65). Costello further testified that he had no reason to believe the Respondent implemented a six-day workweek for any other reason than the legitimate business needs it relayed to the Union. (Tr. 39–40). The ALJ completely ignored this evidence. He further ignored the fact that there was no showing of animus, bad faith, or intent to undermine the Union, instead inferring animus from the unilateral implementation conclusion. This circular reasoning cannot hold water. The ALJ cannot find union animus based upon unilateral implementation when he does not even analyze the Respondent's contractual basis for its decision in his findings. There is no evidence on record that the temporary six-day workweek was implemented for any other reason than the legitimate business reasons expressed to the Union. (Tr. 39–40).

The record evidence establishes there is no contract violation because ADT reasonably interpreted the contract to permit modification of employee schedules for work to be performed on Saturdays upon giving advance notice and there is no evidence of animus, bad faith, or intent to undermine the Union. (Tr. 39–40). Even if reasonable minds can differ on ADT's interpretation, that is a matter for arbitration —not a violation of the Act. Accordingly, the ALJ erred in failing to analyze ADT's temporary implementation of a six-day workweek at its Albany and Syracuse locations without applying the sound arguable basis standard.

C. The six-day workweek was not a material change in terms and conditions of employment

The ALJ further erred in finding that the temporary change to a six-day workweek was a "material, substantial, and a significant' one affecting the terms and conditions of employment of bargaining unit employees." (ALJD 8–9). Even if the change to a six-day workweek were deemed a unilateral change in the terms and conditions of employment of bargaining members, the change to a six-day workweek does not constitute an unfair labor practice. "[N]ot all unilateral changes in bargaining unit employees' terms and conditions of employment constitute unfair labor practices." *Crittenton Hosp.*, 342 NLRB 686, 686 (2004). "The imposed change must be a 'material, substantial, and significant one.'" *Id.* (citing *Fresno Bee*, 339 NLRB 1214, 1216 (2003) (citing *Peerless Food Products*, 236 NLRB 161 (1978))). "A change is measured by the extent to which it departs from the existing terms and conditions affecting employees." *Id.* (quoting *Southern California Edison Co.*, 284 NLRB 1205 fn. 1 (1987), *enf'd mem.* 852 F.2d 572 (9th Cir. 1988)). The ALJ erred in relying on *Fall River* and *Intracoastal Terminal* —both cases involving first contract negotiations— where, furthermore, neither discussed the extent to which the changes affected the terms and conditions of employment of bargaining unit members. (ALJD 8–9). The ALJ further erred in relying on *Fall River Sav. Bank*, 260 NLRB 911, 918

(1982) where the Board found a violation of the Act because the respondent converted a voluntary overtime schedule to a mandatory overtime schedule. Unlike this case, the respondent in *Fall River* argued, *inter alia*, the revision to the work schedule was a variation of past practices. *Id.* at 915. In that case, respondent did not rely on any provisions in the collective bargaining agreement; in fact, *there was no collective bargaining agreement between the parties at the time of the violation.* The respondent denied recognition of the union and refused to meet and negotiate a collective bargaining agreement. *Id.* at 917–18. The cases relied upon by the ALJ are simply not analogous. Furthermore, while the Board in *Intracoastal Terminal, Inc.*, 125 NLRB 359, 367–68 (1959) stated regular and overtime hours of work are "vital aspects of working conditions," it made no determination as to whether the degree of the change was a material, substantial, and significant one.

Accordingly, the ALJ erred in finding a violation of Sections 8(a)(5) and (1). The Syracuse facility implemented the six-day workweek on every second and fourth Saturday of the month until the new target rates were met (*i.e.* from September 22 through about the end of October 2016); the bargaining unit members at the Syracuse facility worked at most three six-day workweeks. (Jt. Ex. 1, 7; Tr. 35). The Albany facility had a larger backlog and, as such, operated under a six-day workweek for about three months. (Jt. Ex. 7; Tr. 35). Notably, it is undisputed that while a six-day workweek was implemented in the Syracuse facility for about one month and in the Albany facility for about three months, the normal workweek remained five days. (Tr. 35–38). Indeed, the Union testified that throughout the last two years the normal workweek has remained a five-day workweek and that at most the change in scheduling for the Albany and Syracuse bargaining unit members was a temporary one that did not span beyond about three months. (Tr. 34–38). As such, contrary to the ALJ's findings, ADT's

implementation of a six-day workweek was a temporary and insubstantial modification and one which was within ADT's reasonable interpretation of what is permitted by the relevant labor agreements.

II. The ALJ's Finding that ADT engaged in Direct Dealing is Contrary to the Law and Facts on Record

The ALJ erred in finding that Respondent engaged in direct dealing with employees regarding mandatory terms and conditions of employment on the basis that "granting a unit employee member an exception that could plausibly be interpreted as favorable treatment, Respondent effectively undermined confidence in the Union by the bargaining group." (ALJD 9–10). When ADT communicated with all bargaining unit members regarding the six-day workweek, the purpose in doing so was not to undermine the Union about a mandatory subject of bargaining, but simply to give the employees advance notice of the schedule change pursuant to Articles 1 and 6 of the labor agreement. It never solicited responses from any bargaining unit members, including Sopok. The prohibition against direct dealing is not a prohibition against the communication between the employer and its employees. "Direct dealing 'involves dealing with employees (bypassing the Union) about a mandatory subject of bargaining.'" *Mercy Health Partners*, 358 NLRB No. 69 (June 26, 2012), citing *Champion International Corp.*, 339 NLRB 672, 673 (2003).

ADT did not engage in direct dealing with Sopok when it granted his plea for a personal accommodation to the six-day workweek. *See Alan Ritchey, Inc.*, 354 NLRB No. 79, at *64 (2009) ("In any case, involving an allegation of direct dealing, the inquiry must concern whether the employer's direct solicitation is likely to erode 'the union's position as exclusive representative.'") (quoting *Modern Merchandising*, 284 NLRB 1377, 1379 (1987)). The ALJ ignored the fact that Sopok approached ADT about his situation only *after* failing to receive any

assistance from his Union representative and after presenting a legitimate reason for his inability to work the scheduled hours. The record evidence simply does not support the ALJ's finding that the accommodation of Sopok's request could plausibly be interpreted as favorable treatment when the record shows that the request was granted only after the Union failed to act on behalf of its bargaining unit member. Furthermore, the record establishes that there was no quid pro quo with Sopok—there was no direct solicitation, threat of reprisal or any offer or promise of a benefit to Sopok. (Tr. 83). The Respondent's willingness to accommodate one employee at his plea without any threat of reprisal, offer or promise of benefit, is not the type of conduct deemed to be unlawful direct dealing under the Act.

III. The ALJ's Finding that ADT Did not Meet its Obligation to Supply Information under Section 8(a)(5) of the Act is Without Support in Law or Fact

The ALJ also erred in finding that the Respondent's delay in providing relevant information was unlawful because it was prejudicial and hampered the Union's ability to enforce the contract. ADT met its obligations under the Act in response to the Union's September 19 information request by either asserting legitimate objections to the information requested or providing the requested information and documentation. It is well established that the duty to supply information under the Act is not absolute. *See Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303 (1979) ("the duty to bargain collectively, imposed by Section 8(a) of the NLRA, includes a duty to provide *relevant* information requested by the union for the proper performance of its duty as the employees' bargaining representative") (emphasis added). "The obligation to supply information is determined on a case-by-case basis, and it depends on a determination of whether the requested information is relevant and, if so, sufficiently important or needed to invoke a statutory obligation on the part of the other party to produce it." *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993). Despite the NLRB's broad discovery standard, a vague or speculative

explanation for a request is insufficient to establish relevance and, consequently, insufficient to trigger an employer's duty to supply the requested information. *See Rice Growers Ass'n of Cal.*, 312 NLRB 837 (1993); *Disneyland Park*, 350 NLRB No. 88 (Sep. 13, 2007); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1099 (1st Cir. 1981).

A. ADT did not unreasonably delay its response to the Union's information request

The ALJ ignored the fact that nothing in the Act prescribes any particular time to respond to an information request (ALJD 10–11). Board precedent is very case-by-case and fact driven as to what is reasonable. *Allegheny Power*, 339 NLRB 585, 587 (2003) (explaining that "[i]n determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident"); *see also, e.g., Silver Bros. Co., Inc.*, 312 NLRB 1060, 1062 (1993) (finding the employer did not delay providing requested information in violation of the NLRA because the employer "was not automatically obligated to furnish the requested information forthwith, but instead was entitled to discuss confidentiality concerns regarding the information request with the Union so as to try to develop mutually agreeable protective conditions for its disclosure to the Union").

In this case, ADT engaged the Union in continuous communications regarding the six-day workweek and the Union's related request for information. (Jt. Exs. 4, 6, 7, 15). As noted above, just about two weeks after receiving the Union's September 19 information request, ADT notified the Union that it was in the process of reviewing the requests and informed the Union that it would respond to its requests by October 14, 2016 (which it did). And after it received the October 24 letters further demanding responses to all of the items in its initial request, ADT responded within a week advising the Union that it was reviewing the Union's October 24 letter and would be updating the Union with a response. (Jt. Ex. 10). On

December 16, 2016, the Respondent did just that. ADT supplemented its responses to the Union's information request and confirmed it had no further responsive information. (Jt. Ex. 15). In spite of these facts on record, the ALJ found ADT's responses unreasonable "when evaluated in conjunction with its unlawful unilateral change to work schedules, along with its direct dealing with a unit employee ..." without citing to any Board law in support of this finding.

B. The Union was not Prejudiced by any Alleged Delay

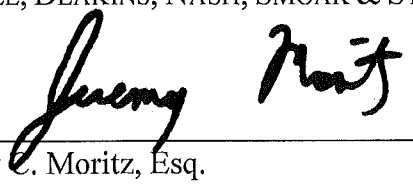
Even assuming, *arguendo*, that ADT unreasonably delayed its response to the Union's September 19 information request, there is no evidence on record that the Union was in any way prejudiced by any alleged delay. The Board has upheld an employers' delay in providing information as lawful where there is "an absence of any evidence that the union was prejudiced by the delay." *Union Carbide Co.*, 275 NLRB 197, 201 (1985) (noting that the union did not present any evidence of prejudice, meaning that the employer's ten month delay did not violate its duty to provide information); *see also USPS,* 2004 WL 1671531 (NLRB Div. of Judges July 19, 2004) (holding that an employer's four month delay did not violate Section 8(a)(5) because the union was not prejudiced by the delay); *Dallas & Mavis Forwarding Co.*, 291 NLRB 980 (1988) (seven month delay lawful given the circumstances). While the documentation forwarded to the Union in December could have been forwarded in October when the Respondent first replied to the Union's information request, there is no evidence on record showing the Union was in any way harmed by that two-month delay. There is simply no evidence on record that the Union was prejudiced by any purported delay in response to its September 19 information request.

CONCLUSION

For all the foregoing reasons, the decision and recommended Order of the Administrative Law Judge should be reversed by the Board and the Complaint against Respondent should be dismissed in its entirety.

DATED this 15th day of September, 2017.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By 

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CERTIFICATE OF SERVICE

I certify that on September 15, 2017, a copy of the foregoing ***RESPONDENT ADT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION*** was Electronically Filed as a .pdf document via the NLRB's e-filing system and transmitted via e-mail to the following parties:

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